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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

VIDAL PRECIADO, Plaintiff and Appellant, v. BANK OF AMERICA, N.A., et al., Defendants and Respondents.	H040583 (Santa Clara County Super. Ct. No. 1-13-CV-250011)

In July 2005 plaintiff Vidal Preciado obtained a $488,000 loan to purchase property in San Jose. In February 2011 he requested assistance with a loan modification from respondent Bank of America, N.A. (BofA), but his application was denied and the property was eventually sold at a foreclosure sale. He sued multiple parties, including BofA, asserting 15 causes of action related to the foreclosure, but the superior court sustained respondents' demurrer without leave to amend. On appeal, plaintiff contends that he adequately pleaded viable causes of action relating to the original loan and his efforts to modify the loan. We will affirm the judgment.

Background

Because this appeal arises from the sustaining of a demurrer, in summarizing the history of the dispute we draw primarily from the facts asserted in the operative pleading, plaintiff's July 24, 2013 complaint. In examining this complaint, the third of his lawsuits against defendants, "we accept as true the properly pleaded material factual allegations of the complaint, together with facts that may properly be judicially noticed." (*Crowley v.*

Katleman (1994) 8 Cal.4th 666, 672; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

On July 18, 2005 plaintiff signed a promissory note in favor of Realty Mortgage, LLC setting forth the principal amount, $488,000, and an adjustable rate beginning with 1 percent, subject to periodic increases up to 9.95 percent. The accompanying deed of trust listed Realty Mortgage LLC as lender, Commonwealth Land Title Company as trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary, "acting solely as a nominee for Lender and Lender's successors and assigns." The deed of trust also included a provision allowing the note to be sold without prior notice to the borrower, a sale that could result in a change in the loan servicer.[1] Any notice was to be "deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. . . . The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender." Plaintiff's complaint does not indicate that he designated a substitute notice address.

[1] This provision stated: "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the 'Loan Servicer') that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser."

Plaintiff alleged that several months after receiving the loan, the lender changed multiple times, causing him to make payments to Countrywide Home Loans Servicing, LP, and then to BAC Home Loan Servicing, LP (BAC). According to respondents, BAC merged with BofA, with which plaintiff's correspondence took place.

In early 2011 plaintiff asked BofA for a loan modification and assistance in avoiding a potential foreclosure. According to the complaint, a loan modification application was mailed to plaintiff, who completed it and faxed it back "to Defendants' offices." Defendants denied having received the package and asked plaintiff to resend it, which plaintiff did. "This exchange occurred approximately five (5) or more times; [BofA] repeatedly claimed to never receive the documents." Eventually BofA denied the loan modification without explaining why.

At some point plaintiff was asked to complete a financial questionnaire to see if he qualified for the Home Affordable Mortgage Program (HAMP). He later received notice that he qualified for the program. He was sent a package which he filled out and faxed back several times; each time he was told that the package had not been received. Upon further contact by telephone on April 23, 2011, BofA again denied having received any completed documents. It sent new documents for plaintiff to fill out.

Meanwhile, on March 1, 2011, respondent ReconTrust Company N.A. (ReconTrust), "acting as an agent for the Beneficiary" under the July 2005 deed of trust, recorded a notice of default stating that plaintiff owed $25,215.95 as of February 25, 2011. A BAC employee declared under penalty of perjury that "Bank of America Home Loans" had tried to contact the borrower in accordance with Civil Code section 2923.5. Plaintiff was unaware of the notice of default until he returned from a vacation in June 2011 and found a notice of trustee sale posted on his door, scheduling the sale for June 23, 2011. Plaintiff then learned that the notice of default had been returned to the bank. As he explained in his complaint, the property, though bearing a San Jose address,

was situated in the City of Alviso, which did not provide mail service to its residents. To receive mail residents were required to provide a post office box.

On March 14, 2011, ReconTrust recorded both a substitution of itself as trustee (replacing Commonwealth Land Title Company) and an assignment of the deed of trust from MERS, the original beneficiary, to the "Bank of New York Mellon fka The Bank of New York as Trustee for the Benefit of the Certificate Holders of the CWALT Inc. Alternative Loan Trust 2005-59, Mortgage Pass Through Certificates, Series 2005-59" (BNY Mellon).

By engaging outside services plaintiff was able to obtain postponement of the sale until July 25, 2011. Nevertheless, unable to post a bond in time to stop the sale that day, plaintiff later learned that the property had been acquired by BofA. The trustee's deed was recorded by ReconTrust on August 8, 2011, reflecting a conveyance from ReconTrust to BNY Mellon for $322,875.

Plaintiff initially brought suit on July 22, 2011, naming BofA, ReconTrust, MERS, and Five Star Investment & Realty (Five Star), which had assisted him in obtaining the loan. The court dismissed this lawsuit without prejudice in February 2012 based on plaintiff's failure to appear at a hearing on the matter. Plaintiff brought a second action on March 16, 2012, this time adding BNY Mellon as a defendant. On March 4, 2013, three days before a hearing on BofA and ReconTrust's demurrer to plaintiff's first amended complaint, plaintiff obtained dismissal of this action without prejudice, the court having tentatively indicated its intent to sustain the demurrer.

Plaintiff filed the instant action on July 24, 2013, again naming BofA, ReconTrust, MERS, BNY Mellon, and Five Star. This time he asserted 15 claims: (1) negligence; (2) fraud; (3) to set aside the trustee's sale; (4) to void or cancel the trustee's deed upon sale; (5) to void or cancel assignment of the deed of trust; (6) wrongful foreclosure; (7) breach of contract; (8) violation of the "First Security Rule"; (9) breach of the implied covenant of good faith and fair dealing; (10) promissory estoppel; (11) unjust enrichment;

(12) violation of Business and Professions Code section 17200; (13) quiet title; (14) slander of title; and (15) violation of Civil Code section 1788 et seq., the Rosenthal Fair Debt Collection Practices Act (Rosenthal Act or the Act).

BofA, MERS, and BNY Mellon again demurred. The court issued its tentative ruling finding no prejudice to plaintiff from any procedural impropriety, as he was in default on the loan at the time of the sale. At the demurrer hearing on December 19, 2013, plaintiff's counsel stated that his purpose was "to ask Court to allow us to amend this complaint because we do believe we have a basis for that amendment. We believe that there were quite a lot of procedural defects with regards [*sic*] to this sale. Those defects, when taken into totality, would show prejudice toward the plaintiff." Counsel added that there were facts showing that the sale was improper, including the fact that "the notice of default was not provided to the plaintiffs [*sic*]" and "issues with regards [*sic*] to the notice of sale being served on the incorrect address. There were issues of dual tracking where the plaintiff was being led to believe that his loan was going to be modified, on the other hand the bank was in the process of selling the house." The court pointed out that counsel had failed to indicate in the opposition to the demurrer that a viable amendment was possible. Counsel apologized for the oversight by his office. The court also expressed "serious doubts" about counsel's assertion that an amended complaint would "pass muster" with the additional facts he wanted to include. After hearing from both sides, the court adopted its tentative ruling and sustained the demurrer.

Discussion

1. *Appealability*

It cannot escape this court's notice that plaintiff has appealed from a nonappealable order, the December 19, 2013 *oral ruling* sustaining defendants' demurrer without leave to amend. Plaintiff does not even acknowledge the subsequent written order of May 8, 2014, directing defendants to submit a proposed judgment of dismissal. Nevertheless, defendants having overlooked this all-too-frequent defect, we have

independently taken judicial notice of the superior court record, which indicates that a judgment of dismissal was eventually entered on July 3, 2014.[2] Accordingly, although we hesitate to promote "the continuation of this sloppy [appellate] practice" (*Katona v. County of Los Angeles* (1985) 172 Cal.App.3d 53, 56, fn. 1), in the interest of judicial economy we will construe plaintiff's notice of appeal as having been filed from the final judgment rather than the oral ruling more than six months earlier. (Cf. *Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 202 (*Los Altos Golf & Country Club*).)

2. *Standard of Review*

Having construed this appeal to be from the judgment of dismissal rather than the nonappealable ruling sustaining the demurrer, we determine independently whether plaintiff's complaint states viable causes of action on any legal theory. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) "Because the function of a demurrer is not to test the truth or accuracy of the facts alleged in the complaint, we assume the truth of all properly pleaded factual allegations. [Citation.] Whether the plaintiff will be able to prove these allegations is not relevant; our focus is on the *legal* sufficiency of the complaint." (*Los Altos Golf & Country Club supra*, 165 Cal.App.4th at p. 203; see also *Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341.) We do not, however, assume the truth of "mere contentions or assertions contradicted by judicially noticeable facts." (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; see also *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1040 ["when the allegations of the complaint contradict or are inconsistent with such facts, we

[2] Plaintiff makes a vague reference to an entry of judgment on this date without citing anything in the appellate record confirming that judicial act. He improperly asserts that this premature appeal was "timely filed" without acknowledging its fundamental defect.

accept the latter and reject the former"].) Nor do we assume the truth of "contentions, deductions or conclusions of law." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) Likewise, "[f]acts appearing in exhibits attached to a complaint will also be accepted as true and will be given precedence over any contrary allegations in the pleadings." (*Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044-1045.)

3. *Plaintiff's Causes of Action*

On appeal, plaintiff addresses the sufficiency of his claims for wrongful foreclosure, fraud, breach of contract, promissory estoppel, unfair competition, slander of title, and violation of the Rosenthal Act. He further asserts that he properly pleaded a cause of action for negligent misrepresentation, though his complaint does not make such an allegation;[3] moreover, his contention on appeal is directed at conduct by Realty Mortgage LLC and Five Star, neither of which is a party in the action.[4] Nevertheless, we will address that claim as well.

a. *Wrongful Foreclosure*

In his sixth cause of action plaintiff asserted that his loan was sold to investors as a mortgage-backed security and that thereafter "none of the Foreclosing Defendants in this action owned this loan, or the corresponding note. [¶] Moreover, none of the defendants . . . were lawfully appointed as trustee or had the original note assigned to them. Accordingly, none of the defendants . . . had the right to declare default, cause notices of default to be issued or recorded, or foreclose on plaintiff's interest in the

[3] The first cause of action for negligence was directed at the inaccurate accounting and servicing of plaintiff's loan, failing to disclose the status and ownership of his loan, and impropriety in both initially financing the loan and offering an "opportunity" for a loan modification.

[4] The record does not indicate that Five Star was among those served with the summons and complaint. Realty Mortgage LLC was not even named in the complaint.

Subject Property. The Foreclosing Defendants were not the note holder or a beneficiary at any time with regard to plaintiff's loan." Plaintiff further alleged that the loan was sold without notice and that "[t]herefore, the loan is void of legal rights to enforce it." Finally, plaintiff alleged that the foreclosure was wrongful because it occurred while he was making payments during negotiations for a "workout" of his loan obligation.

Wrongful foreclosure is "an equitable action to set aside a foreclosure sale, or an action for damages resulting from the sale, on the basis that the foreclosure was improper." (*Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 561 (*Sciarrata)*.) The procedures governing nonjudicial foreclosure sales are governed by Civil Code sections 2924 through 2924k. " 'The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.' " (*Biancalana v. T.D. Service Co*. (2013) 56 Cal.4th 807, 813-14 (*Biancalana*), quoting *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830 (*Moeller*).)

Our Supreme Court has recently summarized the specific steps of foreclosure as follows. "A deed of trust to real property acting as security for a loan typically has three parties: the trustor (borrower), the beneficiary (lender), and the trustee. 'The trustee holds a power of sale. If the debtor defaults on the loan, the beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale.' (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.) . . . [¶] The trustee starts the nonjudicial foreclosure process by recording a notice of default and election to sell. (Civ.Code § 2924, subd. (a)(1).) After a three-month waiting period, and at least 20 days before the scheduled sale, the trustee may publish, post, and record a notice of sale. (§§ 2924, subd. (a)(2), 2924f, subd. (b).) If the sale is not postponed and the borrower does not exercise his or her rights of reinstatement or redemption, the property is sold at auction to

the highest bidder. . . . [¶] The trustee of a deed of trust is not a true trustee with fiduciary obligations, but acts merely as an agent for the borrower-trustor and lender-beneficiary. [Citations.] While it is the trustee who formally initiates the nonjudicial foreclosure, by recording first a notice of default and then a notice of sale, the trustee may take these steps only at the direction of the person or entity that currently holds the note and the beneficial interest under the deed of trust—the original beneficiary or its assignee—or that entity's agent. (§ 2924, subd. (a)(1) [notice of default may be filed for record only by '[t]he trustee, mortgagee, or beneficiary'] . . . .) [¶] . . . [A] borrower can generally raise no objection to assignment of the note and deed of trust. A promissory note is a negotiable instrument the lender may sell without notice to the borrower. [Citation.] The deed of trust, moreover, is inseparable from the note it secures, and follows it even without a separate assignment. (§ 2936 . . .)" (*Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 926-28 (*Yvanova*); see also *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 995 (*Orcilla*); *Moeller, supra*, 25 Cal.App.4th at p. 830.)

As in *Yvanova*, here the note and deed of trust each allowed for sale or transfer of the note without prior notice to the borrower and other potential changes in the loan servicer. "A deed of trust may . . . be assigned one or multiple times over the life of the loan it secures. But if the borrower defaults on the loan, only the current beneficiary may direct the trustee to undertake the nonjudicial foreclosure process." (*Yvanova*, *supra*, 62 Cal.4th at pp. 927-928.)

" 'The statutes provide the trustor with opportunities to prevent foreclosure by curing the default. The trustor may make back payments to reinstate the loan up until five business days prior to the date of the sale . . . . [Citations.] Additionally, the trustor has an equity of redemption under which the trustor may pay all amounts due at any time prior to the sale to avoid loss of the property. (§§ 2903, 2905.)' " (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 101-102 (*Lona*).) " 'The manner in which the sale must be

conducted is governed by section 2924g. "The property must be sold at public auction to the highest bidder. . . . A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender. [Citation.] Once the trustee's sale is completed, the trustor has no further rights of redemption. [Citation.] [¶] The purchaser at a foreclosure sale takes title by a trustee's deed. If the trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser. (. . . § 2924; [citation].)" ' " (*Id*. at p. 102; *Orcilla*, *supra*, 244 Cal.App.4th at pp. 995-96.)

As noted, in sustaining respondents' demurrer the trial court reasoned that plaintiff had alleged no prejudice arising from any improper assignment of his loan, such as interference with his ability to pay the amount due, nor had he alleged that the original lender itself would not have foreclosed. Instead, the court stated, the foreclosure sale was attributable solely to plaintiff's own default.

On appeal, plaintiff renews his argument that foreclosure was wrongful here because the original lender was not the one initiating the procedure. But for the assignment, he "would have had time to act . . . and prevent the sale." His argument indirectly reflects the allegation of the sixth cause of action that none of the "Foreclosing Defendants" held the note, and none had been "lawfully appointed as trustee or had the original note assigned to them" and thus had no right to foreclose.

To establish wrongful foreclosure the plaintiff must show the following: " '(1) [T]he trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from

tendering.' " (*Miles v. Deutsche Bank National Trust Co*. (2015) 236 Cal.App.4th 394, 408, quoting *Lona*, *supra*, 202 Cal.App.4th at p. 104; *Daniels v. Select Portfolio Servicing, Inc*. (2016) 246 Cal.App.4th 1150, 1184 (*Daniels*).) "[M]ere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case." (*Miles, supra,* at p. 409; accord, *Sciarrata*, *supra*, 247 Cal.App.4th at p. 562.)

The parties initially debate plaintiff's standing to assert wrongful foreclosure. Plaintiff points out that he alleged that the assignment of the note was void. Respondents argue that plaintiff lacks standing to challenge the assignment because he "has not alleged facts showing that such an assignment would be void; and [he] has not alleged facts showing that such an assignment—or any other supposed defect in the foreclosure process—prejudiced him."

As both parties are undoubtedly aware, in *Yvanova* our Supreme Court recently explained the dimensions of standing to challenge an assignment in the wrongful foreclosure context. Emphasizing the distinction between void and voidable transactions, the court noted that "only the entity holding the beneficial interest under the deed of trust—the original lender, its assignee, or an agent of one of these—may instruct the trustee to commence and complete a nonjudicial foreclosure. [Citations.] If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever [citations], the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure." (*Yvanova*, *supra*, 62 Cal.4th at p. 935.) "Unlike a voidable transaction, a void one cannot be ratified or validated by the parties to it even if they so desire. [Citations.] Parties to a securitization or other transfer agreement may well wish to ratify the transfer agreement despite any defects, but no ratification is possible if the assignment is void *ab initio*. In seeking a finding that an assignment agreement was void, therefore, a plaintiff in Yvanova's position is not

asserting the interests of parties to the assignment; she is asserting her own interest in limiting foreclosure on her property to those with legal authority to order a foreclosure sale." (*Id*. at pp. 936-937.) When an assignment is merely voidable, on the other hand, "the power to ratify or avoid the transaction lies solely with the parties to the assignment; the transaction is not void unless and until one of the parties takes steps to make it so. A borrower who challenges a foreclosure on the ground that an assignment to the foreclosing party bore defects rendering it voidable could thus be said to assert an interest belonging solely to the parties to the assignment rather than to [himself or] herself." (*Id*. at p. 936.)

The court concluded that "because in a nonjudicial foreclosure only the original beneficiary of a deed of trust or its assignee or agent may direct the trustee to sell the property, an allegation that the assignment was void, and not merely voidable at the behest of the parties to the assignment, will support an action for wrongful foreclosure." (*Yvanova*, *supra*, 62 Cal.4th at at p. 923.) The plaintiff in such an action thus "has standing to claim [that] the foreclosing entity's purported authority to order a trustee's sale was based on a void assignment of the note and deed of trust." (*Id*. at p. 939; see also *Yhudai v. IMPAC Funding Corp*. (2016) 1 Cal.App.4th 1252.)

We need not add to the parties' discussion of the standing issue, because the application of *Yvanova* to plaintiff's pleading is moot. Even if plaintiff had standing to bring this claim based on his assertion of a void assignment, it cannot withstand demurrer. First, plaintiff has not alleged facts showing that the assignment from the original beneficiary (MERS) to BNY Mellon was void rather than merely voidable. "It has been held that, at least when seeking to set aside the foreclosure sale, the plaintiff must also show prejudice and a tender of the amount of the secured indebtedness, or an excuse of tender. [Citation.] Tender has been excused when, among other circumstances, the plaintiff alleges the foreclosure deed is facially void, as arguably is the case when the entity that initiated the sale lacked authority to do so. [Citations.]"

(*Yvanova*, *supra*, 62 Cal.4th at p. 929, fn. 4; see also *Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062 (*Chavez*) [wrongful foreclosure stated where breach of modification agreement by failing to accept borrower's payment provided exception to tender rule].)

Acknowledging that he was in default, plaintiff invokes a single exception to the rule requiring tender to support a cause of action for wrongful foreclosure: He relies on the same assertion that the assignment was void on its face. According to plaintiff, respondents "lacked the authority to foreclose on his home because they were not actually the trustee and beneficiary of the deed of trust." In other words, because he alleged that "the wrong companies foreclosed on his home and that the deed was void, he alleged sufficient facts to infer that the trustee's sale was not voidable, but void, and that accordingly, the tender rule does not apply." He does not, however, explain what *facts* support or explain his legal conclusion that the assignment was void.[5] It is not helpful to state merely that "[t]he Foreclosing Defendants were not the note holder or a beneficiary at any time with regard to plaintiff's loan." He does point to the fact that he did not receive the notice of default; yet the complaint also states that the notice *was* sent to him, but was returned, evidently because he had not provided a post-office box number in lieu of his residence address, where mail service was unavailable.[6] Other than that lack of

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[5] In his complaint, he stated that no tender was required because the complaint "attacks the validity of the underlying debt." That attack consisted in plaintiff's allegation that Realty Mortgage LLC and Five Star, through "manipulative marketing" and by taking advantage of his inability to read and understand English, unjustifiably qualified plaintiff for a loan and induced him to sign the original loan documents containing terms inconsistent with those he was promised.

[6] The promissory note contained a term stating that "any notice that must be given to me [the promisor] will be given by delivering it or by mailing it by first class mail to me at the Property Address . . . or at a different address if I give the Note Holder notice of my different address." The deed of trust likewise stated, "All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to (continued)

notice, the allegations of wrongful foreclosure consist of legal conclusions culminating in the claim that none of the defendants had the right to declare default, issue a notice of default, or foreclose. Those conclusory assertions do not provide the basis for inferring that the trustee's sale was "void, and that accordingly, the tender rule does not apply."

Second, plaintiff cannot show that the allegedly defective assignment was the reason he did not receive the notice of default; on the contrary, the reason, as noted above, was that he had failed to provide an address at which he could receive this document.[7] Nor does plaintiff allege facts explaining how, if he had received the notice of default, he would have had "time to act" and prevent the sale by curing his default. Plaintiff further suggests that but for the assignment, the original lender (Realty Mortgage LLC) would have been out of business and thus unable to foreclose. Nothing in the record, the law, or logic supports such wishful thinking.

Plaintiff also failed to plead facts explaining how the assignment interfered with his ability to cure his default by tendering the amount due. As explained in *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272 (disapproved on another point in *Yvanova*, *supra*, 62 Cal.4th at p. 939, fn. 13), "Prejudice is not presumed from 'mere irregularities' in the process. [Citation.] Even if MERS lacked authority to transfer the note, it is difficult to conceive how plaintiff was prejudiced by MERS's purported assignment, and there is no allegation to this effect. Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for

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Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. . . . The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender."

[7] Plaintiff has not explained how he was able to receive other loan-related correspondence.

another, without changing [the plaintiff's] obligations under the note." Plaintiff's cause of action for wrongful foreclosure was thus subject to demurrer on this ground.

b. *The* "*Loan Allegations*"

Plaintiff briefly returns to his argument in opposition to the demurrer, in which he contested respondents' assertion that all claims arising from the origination of the loan were time barred. Plaintiff does not directly attempt to justify any causes of action applicable to the loan origination; he offers only the statement that his "loan allegations"—which pertain to parties not before us—were filed within two years after the foreclosure sale. Having no developed argument to address, we will disregard this point.

c. *Negligent Misrepresentation*

In plaintiff's appellate argument regarding the cause of action for negligent misrepresentation he asserts that Realty Mortgage LLC and Five Star "promised during negotiation, rates they never intended to realize, taking advantage of [plaintiff's] inability to read English and inducing him to sign loan documents with terms contrary to their oral promises. [¶] This constituted negligent misrepresentation because the defendants were superior in their ability to understand languages that [plaintiff] could not comprehend." These allegations, however, are directed exclusively at parties that were not before the superior court and are not before us on appeal. There is no indication from the complaint that BofA, MERS, BNY, or ReconTrust had any relationship with Realty Mortgage LLC or Five Star that would subject them to liability for acts pertaining to the origination of the loan.

d. *Fraud*

Plaintiff's claim of fraud was based in part on the alleged "pattern and practice of defrauding plaintiff in that, during the life of the mortgage loan, it failed to properly credit payments made and foreclosed on the Subject Property based on plaintiff's alleged non-payment which they knew to be false." BofA was further alleged to have "concealed

material facts known to them but not to plaintiff regarding payments, notices, assignments, transfers, late fees and charges with the intent to defraud plaintiff." Finally, plaintiff alleged that BofA "induced plaintiff to refrain from action to his detriment by promising him that he was accepted in the HAMP program."

On appeal, plaintiff relies on only the last allegation, the misrepresentation that he had been accepted into HAMP, which "was the sole factor in inducing him to continue to negotiate a modification when that was not viable." He relied on this misrepresentation by his forbearance in "seeking bankruptcy protection."

"The elements of fraud are (1) misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance on the misrepresentation, (4) justifiable reliance on the misrepresentation, and (5) resulting damages." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469, citing *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; *Daniels, supra*, 246 Cal.App.4th at p. 1166.) "Fraud must be pleaded with specificity rather than with ' "general and conclusory allegations." ' [Citation.] The specificity requirement means [that] a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793; *Daniels, supra*, at pp. 1166-1167.) "However, 'the requirement of specificity is relaxed when the allegations indicate that "the defendant must necessarily possess full information concerning the facts of the controversy" [citations] or "when the facts lie more in the knowledge of the" ' defendant. [Citation.]" (*Orcilla, supra*, 244 Cal.App.4th at p. 1008; *Daniels, supra*, at p. 1167.) The specificity requirement serves two purposes: " 'to apprise the defendant of the specific grounds for the charge and enable the court to

determine whether there is any basis for the cause of action.' [Citation.]" (*Orcilla, supra,* at p. 1008; *Daniels, supra,* at p. 1167.)

The elements of fraud cannot be established based on plaintiff's complaint. The assertion of "forbearance" by the delay in seeking bankruptcy protection was not alleged in the complaint. The allegation that BofA "promis[ed] him that he was accepted in the HAMP program" is contradicted by the general allegations, in which plaintiff represented that he was told only that he "qualified" for HAMP by completing a financial questionnaire; the acceptance could not have occurred until he submitted additional documents—which BofA allegedly denied having received. Plaintiff further alleged that BofA "eventually denied" the application for a loan modification. No other specific allegations of detrimental reliance are stated in the complaint; it does not assert, for example, that plaintiff would have pursued any other options, such as selling his home, retaining counsel earlier, or finding a co-signer for his home. At most he alleged only that had he known "the true facts," he "would not have maintained the Foreclosing Defendants as their lender, servicer and trustee (and their alleged agents) and/or would have taken legal action immediately to save his house." The superior court did not err in sustaining the demurrer to this claim.

e. *Breach of Contract/Promissory Estoppel*

Although plaintiff asserts that he pleaded a cause of action for breach of contract, his actual argument is confined to his 10th cause of action for promissory estoppel. "Promissory estoppel is an equitable doctrine that allows enforcement of a promise that would otherwise be unenforceable based on lack of consideration. [Citation]." (*Chavez, supra,* 219 Cal.App.4th at p. 1063; *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) " ' "Promissory estoppel applies whenever a 'promise *which the promissor should reasonably expect* to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance' would result in an 'injustice' if the promise were not

enforced. . . .” ’ [Citation.] [¶] ‘[A] party plaintiff’s misguided belief or guileless action in relying on a statement on which no reasonable person would rely is not justifiable reliance. . . . “If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, . . . he will be denied a recovery.” ’ [Citation.] A mere ‘hopeful expectation[ ] cannot be equated with the necessary justifiable reliance.’ ” (*Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 227.)

“ ‘The elements of a promissory estoppel claim are “(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.” [Citation.]’ ” (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 945; *Orcilla*, *supra*, 244 Cal.App.4th at p. 1007.) None of the allegations of plaintiff’s tenth cause of action for promissory estoppel supports plaintiff’s position. The complaint alleged that defendants “made promises through oral and written representations that they would not foreclose on the property if plaintiff completed an application for a loan modification and made monthly payments in an amount certain to defendants.” This statement, which is contradicted by the allegations of an incomplete application procedure, does not suggest a clear and unambiguous promise.[8] Plaintiff does not argue otherwise; instead, to avert the obstacle of the statute of frauds, he redirects his theory to the doctrine of *equitable* estoppel.

“Generally, ‘four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the

[8] Plaintiff’s opposition was plainly insufficient; he merely stated irrelevantly and vaguely that “Plaintiffs [*sic*] would have sought a loan modification in the absence of defendants’ promises. Moreover, plaintiff would have been in a better position if he had not had to spend money on three lawsuits to seek redress for defendants’ reprehensible conduct. Accordingly, the demurrer should be overruled.”

estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' " (*Chavez, supra,* 219 Cal.App.4th at p. 1058, quoting *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) Plaintiff contends that he relied on "the promise of prospective modification" by forgoing bankruptcy filing. But the complaint sets forth no promise; it only describes the preliminary step of qualifying to apply for HAMP, with the subsequent denial of plaintiff's application. Estoppel was not a viable theory on these alleged facts.

f. *Unfair Competition*

Plaintiff's 12th cause of action alleged that defendants had violated Business and Professions Code section 17200, et seq., the "Unfair Competition Law" (UCL) through their ongoing "deceptive business practices with respect to mortgage loan servicing, assignments of notes and deeds of trust, foreclosure of residential properties and related matters . . . ," resulting in continuing "substantial harm to California consumers . . . in the form of unfair and unwarranted late fees and other improper fees and charges." On appeal, plaintiff shifts to a new theory: that he "suffered injury based on Respondent's [*sic*] violation of [Civil Code section] 2923.5." But plaintiff neither alleged specific conduct amounting to a violation of this statute nor explains on appeal what that conduct was and how it constituted a violation of the UCL.[9] The complaint instead focused on general loan servicing practices toward consumers in general and on defendants' "uniform pattern and practice of unfair and overly[ ]aggressive servicing that result in the assessment of unwarranted and unfair fees against California consumers, and premature default often resulting in unfair and illegal foreclosure proceedings."[10] In neither the

[9] In his opposition to the demurrer he stated only that he suffered injury in fact through the "loss or deprivation of money," which was "caused by the unfair business practices of the defendants."

[10] Plaintiff specifically alleged: "(a) Assessing improper or excessive late fees; (b) Improperly characterizing customers' accounts as being in default or delinquent status (continued)

complaint nor his appellate brief has plaintiff set forth the nature of any defendant's failure to comply with the provisions of Civil Code section 2923.5. This fundamental omission is fatal to plaintiff's reframed UCL cause of action.

g. *Slander of Title*

In plaintiff's 14th cause of action he alleged that ReconTrust "wrongfully and without privilege" recorded a notice of trustee's sale and then a trustee's deed upon the foreclosure sale. These acts "slandered plaintiff's title in that the conduct and acts of defendants violated among others [C]ivil [C]ode section 2924, [subdivision] (a)(1)([C])."

"Slander or disparagement of title occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes the owner thereof ' "some special pecuniary loss or damage." ' [Citation.] . . . If the publication is reasonably understood to cast doubt upon the existence or extent of another's interest in land, it is disparaging to the latter's title. [Citation.]" (*Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1030 (*Sumner Hill Homeowners' Assn.*).)

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to generate unwarranted fees; (c) Instituting improper or premature foreclosure proceedings to generate unwarranted fees; (d) Misapplying or failing to apply customer payments; (e) Failing to provide adequate monthly statement information to customers regarding the status of their accounts, payments owed, and/or basis for fees assessed; (f) Seeking to collect, and collecting, various improper fees, costs and charges, that are either not legally due under the mortgage contract or California law, or that are in excess of amounts legally due; (g) Mishandling borrowers' mortgage payments and failing to timely or properly credit payments received, resulting in late charges, delinquencies or default; (h) Treating borrowers as in default on their loans even though the borrowers have tendered timely and sufficient payments or have otherwise complied with mortgage requirements or California law; (i) Failing to disclose the fees, costs and charges allowable under the mortgage contract; (j) Ignoring grace periods; (k) Executing and recording false and misleading documents; and (*l*) Acting as beneficiaries and trustees without the legal authority to do so; (m) misrepresenting the foreclosure status of properties to borrowers; (n) other deceptive business practices."

Civil Code section 2924, subdivision (a)(1), prescribes the contents of a notice of default. Subdivision (a)(1)(C), the provision on which plaintiff's claim is based, requires the notice of default to include "[a] statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default." Under Civil Code section 2924, subdivision (d)(1), however, the publication of the notices required as part of the nonjudicial foreclosure process is protected by the qualified privilege set forth in Civil Code section 47, subdivision (c)(1). (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 335-336 (*Kachlon*) [construing former Civil Code section 2924, subdivision (d)].) To overcome the qualified privilege, the plaintiff must also allege malice. In this context, "malice is defined as actual malice, meaning ' "that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." ' [Citations.]" (*Kachlon*, *supra*, at p. 336.)

Plaintiff contends that he did allege malice in his 14th cause of action, by accusing respondents of acting with a "reckless disregard for the truth" in recording the notice of default, "because they were aware that that [*sic*] they violated the law in recording the deed of trust." The complaint, however, is insufficient to allege a basis for liability. It does not state facts giving rise to even an inference of malice, much less allege malice itself; at most it states in conclusory fashion that ReconTrust's recording of the notices of default and trustee's sale were made "without privilege." (See *Lesperance v. North American Aviation, Inc*. (1963) 217 Cal.App.2d 336, 341 [where qualified privilege applies, pleading must contain affirmative allegations of malice in fact].) Moreover, the complaint does not allege *facts* (rather than mere conclusions) indicating that the notice of default and notice of trustee's sale were without privilege or justification, since there is no allegation that plaintiff fully complied with the loan documents or that no default

occurred. The demurrer to plaintiff's cause of action for slander of title was properly sustained.

h. *Violation of the Rosenthal Act*

In plaintiff's 15th cause of action he characterized his payment obligation as "a consumer debt pursuant to the [Rosenthal Act]." He accused "BOFA and DOES" as having "made false representations in connection with the debt secured by the [deed of trust] on the subject property. Specifically, [BofA] represented that plaintiff's loan modification had been accepted and that if the monthly payments were made, they would not foreclose on the Subject Property." In their demurrer respondents argued that foreclosure on property did not constitute debt collection.

On appeal, plaintiff does not affirm the merit of the pleading itself, but only maintains that respondents (without specifying which) were debt collectors because "the debt was already in default when it was assigned albeit wrongly. Because the debt was already in default at the time of the assignment, Respondents cannot argue that they are not debt collectors." However, even if BofA is in fact a debt collector under the Rosenthal Act,[11] plaintiff does not attempt to justify the central allegation of the claim—that BofA falsely represented that plaintiff's loan modification had been accepted and that it would not foreclose if plaintiff made the monthly payments. This allegation is plainly contradicted by the previous representation that plaintiff only met the qualifications to *apply* for a modification. The complaint did not identify—nor does he assert on appeal—the specific provision of the Act that BofA violated in handling

[11] Civil Code section 1788.2 generally defines "debt collector" under the Act as "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection." To the extent that plaintiff on appeal is attempting to bring ReconTrust within reach of the Rosenthal Act, that effort cannot succeed, as trustees are protected from liability under the Act for performing the acts required in the foreclosure process. (Civ. Code, § 2924, subd. (b).)

plaintiff's request for a loan modification. Plaintiff has thus failed to show how BofA's conduct constituted a claim for violation of the Rosenthal Act.

4. *Amendment of the Complaint*

Having failed to meet his burden to show how the facts alleged in his complaint are sufficient to state a viable cause of action, plaintiff turns to the prospect of amending his pleading. "When a demurrer is sustained without leave to amend, 'we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.' (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) 'The burden of proving such reasonable possibility is squarely on the plaintiff.' (*Ibid*.) 'Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636." (*Lewis v. YouTube, LLC* (2015) 244 Cal.App.4th 118, 127-128; *Daniels*, *supra*, 246 Cal.App.4th at p. 1163; *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1035.)

Plaintiff contends that the superior court "failed to adhere to the law and acted arbitrarily when it found that it was necessary for trial counsel to apply for leave to amend the complaint before the demurrer was heard." He "posits that had the court allowed counsel to file an amendment to his complaint he would have shown that his claims were viable." Plaintiff misstates the court's ruling, however. *After* the hearing on the demurrer, the court found not just that plaintiff had failed to request an opportunity to amend,[12] but that plaintiff had not made "any offer as to how the complaint could be amended" to allege prejudice.

[12] This was an inaccurate statement. At the demurrer hearing plaintiff's counsel clearly asked the court for an opportunity to amend the complaint.

Plaintiff makes one such offer on appeal, limited to the wrongful foreclosure claim: He contends that had he been "allowed" to file an amendment, he "would have shown that the substitution of the loan beneficiary and trustee prejudiced him in two ways: [(]1) BofA breached its fiduciary duty to explain the terms of his loan because its agents knew he was especially vulnerable to fraud as he could not read English; and [(]2) the new assignee did not mail any notice to plaintiff of his default, and had it done so plaintiff would have corrected his default which was relatively minor." We have already concluded, however, that (1) the allegations concerning the misleading loan origination could not be attributed to BofA, and (2) notice of default was in fact mailed to plaintiff at the address he had provided. Plaintiff suggests no other amendment that would make any of his causes of action viable. The court properly dismissed his complaint.

Disposition

The judgment is affirmed.

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ELIA, ACTING P.J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.

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